

ICTR-99-54-T
15-04-2009
(552 - 546bis)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 15 April 2009

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The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON DEFENCE MOTION FOR CERTIFICATION TO APPEAL THE
TRIAL CHAMBER'S DECISION OF 25 MARCH 2009 ON DEFENCE MOTION
TO VARY TRIAL DATE**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. David C. Thomas

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Trial Chamber");

BEING SEIZED of the "Defence Motion for Certification to Appeal the Trial Chamber's Decision on Defence Motion to Vary Trial Date Rendered on March 25, 2009", filed on 30 March 2009 (the "Motion");

CONSIDERING:

a) The "Prosecution's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision on Defence Motion to Vary Trial Date Rendered on 25 March 2009", filed on 2 April 2009 (the "Response"); and

b) The "Defence Reply to Prosecutor's Response to Defence Motion for Certification to Appeal the Trial Chamber's Decision on Defence Motion to Vary Trial Date, Rendered on March 25, 2009", filed on 6 April 2009 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 73 (B) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 25 January 2009, the Trial Chamber issued a decision denying in its entirety a Defence motion to vacate the 4 May 2009 trial date, but, for scheduling reasons, ordered that the trial shall commence on 18 May 2009.¹
2. On 11 March 2009, the Defence filed a motion to defer the 18 May 2009 trial date.² In a decision of 25 March 2009 (the "Impugned Decision"),³ the Trial Chamber considered that none of the arguments raised by the Defence warranted a reconsideration of the Chamber's previous Decision of 25 February 2009 and denied the motion in its entirety, reiterating its order that the trial shall commence on 18 May 2009.

¹ Decision on Defence Motion to Vacate Trial Date of 4 May 2009, 25 February 2009, p. 4 ("Decision of 25 February 2009").

² Defence Motion to Continue 18 May 2009 Trial Date, 11 March 2009, para. 21 ("Motion of 11 March").

³ Decision on Defence Motion to Vary Trial Date, 25 March 2009, pp. 5-6.

SUBMISSIONS OF THE PARTIES***Defence Motion***

3. The Defence submits that the issues decided by the Trial Chamber in the Impugned Decision satisfy the requirements for certification to appeal as set out in Rule 73 (B) of the Rules.⁴

4. The Defence alleges that the trial date adjudicated upon in the Impugned Decision is an issue that would significantly affect the fairness of the proceedings and the outcome of the trial. It submits that there can be no meaningful trial if the trial date remains as 18 May 2009 as the Defence will not be ready for trial, and a conviction would therefore be the inevitable outcome of such a trial. The Defence argues that, because a viable defence given reasonable time for preparation would provide the Accused with an excellent chance of prevailing, a reversal of the Impugned Decision by the Appeals Chamber would significantly affect the outcome of the trial.⁵

5. In support of this argument, the Defence refers to a decision in the case of *Bagosora et al.*, which granted certification to appeal after a Trial Chamber had denied a defence motion to postpone the trial date based on the lack of time for adequate preparation of a recently-appointed Lead Counsel.⁶ The Defence further refers to a decision in the case of *Krajišnik*, in which certification to appeal was also granted after a Trial Chamber had denied a defence motion to adjourn the proceedings.⁷

6. The Defence further submits that an interlocutory decision by the Appeals Chamber on the present issue could materially advance the proceedings, since a reversal of the Impugned Decision would give the Defence adequate time to prepare its case, and to be ready to meet the Prosecution's case.⁸

7. The Defence further refers to a ruling in *Bagosora et al.*, in which a Trial Chamber held that an appeal's prospect of success was met by showing some basis to believe that a Trial Chamber was so unfair or unreasonable as to constitute an abuse of its discretion. The Defence alleges that this has been the case in respect of the Impugned Decision, as the Chamber has not properly considered the Defence's lack of time to investigate. Further, the Defence submits that the Chamber did not provide a sufficient explanation as to the reason the Defence in the present case has not been afforded as much preparation time as the Defence in the other cases mentioned in the Motion of 11 March 2009. Moreover, the Defence argues that the Trial Chamber, while denying that it took the Completion Strategy into account when deciding upon a trial date, did not provide another reason for its setting of the trial date. Finally, the Defence submits that the rush to

⁴ Motion, para. 11.

⁵ Motion, para. 17.

⁶ Motion, para. 15.

⁷ Motion, para. 16.

⁸ Motion, para. 18.

3 

a judgment is prejudicial with regard to the due process rights of the Accused to have adequate time to prepare for trial.⁹

Prosecution's Response

8. In its Response, the Prosecution first notes that a substantive part of the Defence Motion pertains to issues that should be addressed on appeal and would only become relevant if certification is granted. The Prosecution therefore deems it premature to engage in such issues at this stage of the proceedings.¹⁰

9. With regard to the issue at stake, the Prosecution notes that a failure to address the issues raised by the Defence pertaining to the Accused's due process rights may at a later stage cause unnecessary delays in the proceedings.¹¹

10. The Prosecution reiterates its opposition to a rescheduling of the trial date of 18 May 2009 in light of the negative effects this would have on the right of the Accused to be tried without undue delay pursuant to Article 20 (4)(c) of the Statute.¹²

11. However, the Prosecution observes that the Accused's right to be tried without undue delay has to be balanced against his right to have adequate time for the preparation of his defence, pursuant to Article 20 (4)(b) of the Statute, and submits that if the Trial Chamber decides to grant the certification to appeal, an immediate resolution on all issues addressed by the Impugned Decision may materially advance the proceedings considering the scheduled trial date of 18 May 2009.¹³

Defence's Reply

12. The Defence notes the Prosecution's concessions,¹⁴ which encompass both requirements set forth in Rule 73 (B) of the Rules, and concludes that the Prosecution has acknowledged that the Motion satisfies those criteria.¹⁵

13. With regard to the Prosecution's opposition to a delay in the commencement of trial because of infringements of the Accused's right to be tried without undue delay,¹⁶ the Defence submits that this right belongs primarily to the Accused and that Prosecution thus has no standing to assert its breach. Further, the Defence points out that this objection does not pertain to the criteria of Rule 73 (B) of the Rules, but to the merits of the Impugned Decision and is therefore not relevant for the purposes of the decision on certification to appeal.¹⁷

⁹ Motion, para. 12.

¹⁰ Response, para. 9.

¹¹ Response, para. 10.

¹² Response, para. 11.

¹³ Response, para. 12.

¹⁴ See *supra* paras. 9, 11.

¹⁵ Reply, paras. 11, 12, 14.

¹⁶ See *supra* para. 10.

¹⁷ Reply, para. 13.

14. In respect of the Prosecution's observation that some of the arguments the Defence raised in its Motion do not pertain to the requirements of Rule 73 (B) of the Rules but rather to substantive issues of law that would correctly only be addressed if certification to appeal is granted,¹⁸ the Defence asserts that the case law is not clear in this regard and that some cases do support this contention while others reject it. The Defence in this case, however, chose to address this issue to demonstrate that the Motion has arguable merit.¹⁹

15. Finally, the Defence reiterates its request for certification to appeal the Impugned Decision.²⁰

DELIBERATIONS

16. Rule 73 (B) of the Rules requires that two cumulative criteria be satisfied before a Trial Chamber may grant an application for certification to appeal: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.²¹

17. Rule 73 (B) of the Rules thereby governs the exercise of the Trial Chamber's discretion to grant certification for an interlocutory appeal.²² Even where both requirements of the Rule are satisfied, certification remains at the discretion of the Trial Chamber.²³

18. The Chamber recalls that when determining whether to grant leave to appeal, it is not concerned with the correctness of its impugned decision.²⁴ All considerations such as whether there was an error of law or abuse of discretion in the decision at stake are for the consideration of the Appeals Chamber after certification to appeal has been granted,

¹⁸ See *supra* para. 8.

¹⁹ Reply, para. 15.

²⁰ Reply, para. 16.

²¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber's Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", 12 January 2005, p. 1.

²² *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

²³ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, p. 1; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

²⁴ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeals, 16 February 2006, para. 4; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 4.

and therefore irrelevant to the decision for certification.²⁵ Insofar as the Parties have made such contentions, the Trial Chamber will not consider them.

19. The Chamber considers that the issues addressed in the Impugned Decision pertain to the fairness of the proceedings and, in particular, to the question whether the Accused and his Defence would have had sufficient time to prepare the Defence case if the trial proceeds on 18 May 2009 as scheduled. In the Chamber's view, the issue at stake might have an impact on the outcome of the trial. For this reason, the Trial Chamber considers that the first criterion of Rule 73 (B) of the Rules is met.

20. As regards the second requirement of Rule 73 (B) of the Rules, the Trial Chamber is satisfied that an immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings since a resolution of this matter at any later stage could impact on the Accused's right to a fair trial. For this reason, the Trial Chamber considers that the second criterion of Rule 73 (B) of the Rules is met.

21. The Chamber therefore grants the Motion for certification to appeal. If the determination of the appeal is filed later than the set trial date of 18 May 2009, the commencement of the trial shall be stayed. However, without prejudice to the outcome of the appeal, the Chamber underscores that pre-trial matters should continue to be addressed pending the outcome of the appeal in order to have the case ready for trial.

FOR THE ABOVE REASONS, THE TRIBUNAL

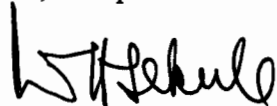
GRANTS the Motion; and

ORDERS a stay of the commencement of the trial, should a determination of the appeal be filed later than the set trial date of 18 May 2009; and

DIRECTS the Parties to continue to comply with their pre-trial obligations.

²⁵ *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material", 4 February 2005, para. 28.

Arusha, 15 April 2009



William H. Sekule

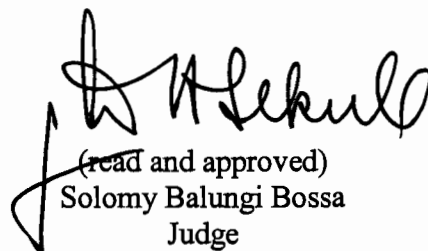
Presiding Judge



Arlette Ramaroson



[Seal of the Tribunal]



(read and approved)
Solomy Balungi Bossa
Judge

(absent at the time of
signature)